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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 125,

PHILADELPHIA BAR ASSOCIATION

INDEPENDENT SCHOOL DISTRICT OF ACKLEY,
Plaintiff in Error,

vs.

F. G. HALL, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR UPON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

GALUSHA PARSONS,
of Counsel for Plaintiff in Error.

P. C. KENYON, Legal Printer, Des Moines, Iowa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

INDEPENDENT SCHOOL DISTRICT OF ACKLEY, *Plaintiff in Error*,
vs.
F. G. HALL, *Defendant in Error.*
No. 725.

BRIEF FOR PLAINTIFF IN ERROR UPON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

Assignment of errors and prayer for reversal. The circuit court had no JURISDICTION, *wherefore plaintiff in error prays that the judgment be reversed.*

This action was brought upon certain school district bonds issued by the board of directors of the plaintiff in error for the construction of a school-house, payable to *Foster Brothers* or *order*.

The statute under which they were issued is as follows:

CHAPTER 98, LAWS OF IOWA, 1868.

AN ACT to authorize independent school districts to borrow money and issue bonds therefor, for the purpose of erecting and completing school-houses, legalizing bonds heretofore issued, and making school orders draw six per cent interest in certain cases.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That independent school-districts shall have the power and authority to borrow money for the purpose of erecting and completing school-houses, by issuing negotiable

bonds of the independent district, to run any period not exceeding ten years, drawing a rate of interest not to exceed ten per centum per annum, which interest may be paid semi-annually, which said indebtedness shall be binding and obligatory on the independent district for the use of which said loan shall have been made: *Provided*, No district shall permit a greater outstanding indebtedness than an amount equal to five per centum of the last assessed value of the property of the district.

SEC. 2. When any independent district has procured the site for and is ready to erect, or has erected and is desirous of completing, its school-house, it shall be lawful for the school board of such district to submit to the voters of their district, at the annual or a special meeting, the question of issuing bonds as contemplated by this act, giving the same notice of such meeting as is now required by law to be given for the election of officers of such districts, and the amount proposed to be raised by the sale of such bonds, which question shall be voted upon by the electors, and if a majority of all the votes cast on that question be in favor of such loan, then said school board shall issue bonds to the amount voted, in denominations of not less than twenty-five dollars, nor exceeding one thousand dollars, due not more than ten years after date, and payable at the pleasure of the district at any time before due, which said bonds shall be given in the name of the independent district issuing them, and shall be signed by the president of the board and delivered to the treasurer, taking his receipt therefor, who shall negotiate said bonds at not less than their par value, and countersign the same when negotiated. The treasurer shall stand charged upon his official bond with all bonds that may be delivered to him: *Provided*, That any bond or bonds not negotiated may be returned by him to the board.

SEC. 3. Nothing in this act shall be deemed to conflict or interfere with subdivision five, of section seven, of chapter one hundred and seventy-two, of the laws of the Ninth General Assembly of the state of Iowa; but in the event the electors of an independent school-district which has issued bonds shall at the annual meeting in March, for any year, fail to vote sufficient school-house tax to raise a sum equal to the interest on the outstanding bonds which will accrue during the then coming year, and such *pro rata* portion of the principal as will liquidate and pay off said bonds at maturity, then it shall be lawful for the school board of such district to vote a sufficient per cent on the taxable property of the district to pay such interest and such *pro rata* portion of the principal as will pay said bonds in full by the time of their maturity, and shall cause the same to be certified and collected the same as other school taxes.

SEC. 4. All school orders shall draw six per cent interest after having been presented to the treasurer of the district and not paid for want of funds, which fact shall be indorsed upon the order by the treasurer.

SEC 5. All bonds of independent districts, heretofore issued in a manner conforming substantially with the provisions of this act, are hereby declared to be legal and valid.

SEC. 6. This act, being deemed by the General Assembly of immediate importance, shall be in force from and after its publication in the Daily State Register and Evening Statesman, newspapers published at Des Moines, Iowa. Approved April 6, 1868.

The defendant, in the court below, claimed:

1. That the court had no jurisdiction of the subject matter; for the reason that the bonds were payable to the payees named or order, and the petition contained no allegation as to their citizenship.

2. Among other defenses it was alleged that the law was unconstitutional as embracing more than one subject (section four), and if constitutional that it gave no authority to issue bonds in this form and payable to a particular person or order as that would defeat their negotiation, the purpose of the law being to borrow money; and lastly, that if the law was constitutional and the authority given, they were in excess both of the constitutional limitation and of the limitation precribed in the act.

Judgment was originally taken by default. The defendant moved to set aside the default upon two grounds: first, that the court had no jurisdiction; and second, excusing its default. The court denied the motion as to the first ground, and sustained it as to the last.

The case was tried without a jury and judgment rendered for the plaintiff. In view of the great number of the decisions of this court holding that an excess of the limitation fixed by the constitution or law of a state constitutes no defense to the bonds in the hands of a *bona fide* holder, the defendant made no bill of exceptions, but has brought the case here upon the single question of the jurisdiction of the circuit court. If it has no jurisdiction under the law, as very well settled in Iowa, that the issue exceeded the limitation of the law or constitution is a good defense, so the defendant has brought here no mere *empty* question. Among the decisions of the Supreme Court of Iowa is one made in an action brought upon a number of bonds of the identical issue of which those now here are a part. *Mosher vs. I.*

D. of Ackley, 44 Iowa, 122. If the defendant can compel the plaintiff to go into the state courts it has a good defense, while in the federal courts it has none; so, to repeat, it has come here upon the sole question of jurisdiction, and I hope if, upon *that* question, any assignment of errors is necessary, counsel upon the other side will take this as *it*.

It was not the idea of counsel representing the defendant in bringing this writ of error in view of two well settled rules of this court that any assignment of errors was necessary.

The rules referred to are: first, that in the federal courts jurisdiction must always affirmatively appear; and second, that questions of jurisdiction dependent upon the subject matter are always open, requiring neither plea, motion, bill of exceptions, nor assignment of errors; that an appellate or any other court will always *pass* upon that question of its own motion.

The truth is, that the transcript was sent into this court by the clerk of the circuit court in the absence of the counsel obtaining the writ or possibly *ex abundanti cautela*, he might have done what he now thinks and would then have thought, if he had thought of it at all, an unnecessary act. If the rule is as above supposed to be, of course if we had tried ever so hard, we could not, by any attempted waiver, have given to the court a jurisdiction what the law did not give it; and that is the question which is, or at the proper time, will be here for discussion and decision. I will briefly indicate the views which influenced the bringing of the writ, and why I think now as then; that upon *the face of the record*, the circuit court had no jurisdiction. We complain of no error in the proceedings; what we do complain of is, that the court *proceeded at all*. To *discuss* a question which has been before this court any time for nearly twice these fifty years, whether it will of its own motion, keep the courts over which by the constitution it is appointed to supervise within their proper jurisdiction or not, would imply either that the writer was a stranger here and hereabouts, or that he cared but little for

the presence into which he had come. I shall assume for the present that if your Honors have a *reasonable doubt* as to whether the circuit court had jurisdiction or not, this writ will not be dismissed. I suppose I might put it stronger and say that unless it is *entirely clear* that it had jurisdiction the writ will not be dismissed. The question is *new*, it has, perhaps, upon one or two occasions come very *near* being here, as in *M. & M. Co. vs. Bradley*, 4 Mo., 22., Tr., 384; but that case was clearly distinguishable from this, inasmuch as the *new* agreement endorsed upon the bonds was a promissory note payable to bearer. So far as I have been able to ascertain, the question whether the act of March 3, 1875, has as to paper payable to *order*, other than that provided for in liens, namely, *promissory notes negotiable by the law merchant*, made any change in the jurisdiction of the circuit courts, is here in a case directly and necessarily involving that question, and only that question, for the first time. It seems to me that it may be easily answered by the application of two or three very well settled principles; first, that those courts have such jurisdiction, and such only as the acts of congress, under the constitution, give them; second, that this court having, for many years, given a construction to the section of the judiciary act, of which this was an amendment, a construction which must be regarded as known to congress, at the time, which recognized a jurisdictional distinction between negotiable promissory notes payable to bearer, and those payable to order, it will not be intended that congress designed to abolish that distinction, unless that intention is clearly expressed; third, that the *words* of an act of congress or of a state legislature conferring jurisdiction over *one* thing, will not, by construction, be held to give such jurisdiction over another and different thing simply because they may, by possibility and for certain purposes, be used as equivalents. In other words, when Congress gave jurisdiction over promissory notes of a certain class, namely, those which were negotiable by the law *merchant*, it will not be in-

tended that they meant *bonds*, even though the latter may, by the course of decisions in more modern times, have come to be regarded as negotiable paper. I submit that it no more follows that they *are* promissory notes simply because they are capable of being made to perform some or all of the offices of that kind of paper than it would follow that a mule was a horse because he might be hitched to the same cart.

In *Coe vs. R. R. Co.*, and Fed. Rep., 534, the language of Judge BLATCHFORD, (which, perhaps, I ought not to put in quite so close proximity to the sentence last written,) was:

"*It cannot be supposed that Congress in 1875, with the large experience which had been had at that time in the United States in bonds, obligations, certificates of indebtedness*, and promissory notes, under seal and not under seal, of municipal corporations and private corporations, did not understand and recognize, in making such exception, the distinction between a promissory note negotiable by the law merchant, as an instrument well known to the law and to commerce and to be identified by that description, *and other instruments* which, though they had become by statute or general usage or judicial decisions to be regarded as in a certain sense negotiable, *were not promissory notes negotiable by the law merchant*. The obligations of municipalities payable to bearer have been placed by numerous decisions of the Supreme Court of the United States in the category of negotiable instruments transferable by delivery so far as to authorize the holder to demand payment of them, and to maintain in his own name an action upon them, but they do not thereby necessarily become negotiable instruments in the sense of the law merchant."

A detached coupon of the usual form (these, however, are neither detached nor in the usual form, being mere *orders* upon the district treasurer: *Wall vs. County of Monroe*, 103 U. S., 74; *The Mayor vs. Ray*, 19 Wall., 468; and in the latter there was *no assignment of errors)*, may, probably, without any great strain of language, be called a promissory note. In this case only two of the bonds had any coupons, and they were still attached. In addition to the natural meaning of the language in ordinary use, and the universally recognized difference between a bond and a promissory note, I desire to call your Honors' attention to what this school district was by this act authorized to do:

1. It was authorized to borrow money for certain purposes, and not exceeding a certain amount.

2. For that purpose it was authorized to issue negotiable *bonds* to be made payable at a time certain not to exceed ten years, or *at the pleasure of the district*, the latter omitted in these bonds.

3. They were to be delivered to its *treasurer*—not as in this case to the contractors—for *negotiation* at not less than their par value, any not sold to be returned, and he to stand charged upon his official bond with all delivered to him. Did the legislature intend by all this that this and all other independent school districts contrary to anything that had ever before been heard of in the state, should be authorized to issue negotiable promissory notes practically *ad libitum*, or did they by the minuteness and particularity of these provisions, mean *bonds* as that word was understood in Iowa, and with the incidents and limitations that the courts of that state understood to be inseparable from that kind of an instrument?

I have had an intimation that all this did not mean anything, or was not worth mentioning, because they were not either by this act or by the general law of Iowa required to be under *seal*, and something has been said to the effect that the rule of the common law as to the non-negotiability of that kind of instruments was a *technical* rule; well, suppose it was, it was the law nevertheless, and by that law a *bond* was not negotiable, and as the common law is a part of the law of Iowa, that is the law of Iowa, unless it has been in some way changed. Let it be granted as it is, that by the common law to make an instrument a bond it must be under seal, and that at the moment a seal was affixed to a paper its character for many and important purposes of the law was changed, that that law so understood came to Iowa and became a part of its system, and that bonds with such qualities, and trammels, and limitations, and advantages, for there were some, took their place among the different kinds of paper, used and bought and sold by its citizens. That inconveniences, and accidents, and mistakes happening, it was suggested that seals upon bonds and all other instruments might as well be

done away with and that accordingly a law was passed to that effect. What would *follow* from all this? That the instrument which the legislature had said should no longer require a seal *to make it a bond* would no longer be a bond, that it would acquire some new *character* or lose any of the incidents, advantages, or disadvantages, or *dignities* and immunities which had by the decisions of the courts from time immemorial been held to pertain to that kind of paper? That would have been a *revolution* not as to the *form* of the paper, but one which would have required a reconstruction of men's business ideas. Which of these two things is it most likely the legislature had in view in passing the act in relation to and abolishing the use of seals?

By the common law to pass title to land it was necessary, after our ancestors had learned to write and had come to use written instruments at all, that the instrument of conveyance be under seal. It might as well be said that a deed was no longer a deed, that no title would pass by it because it came within this general law declaring that seals shall no longer be necessary. But I am not making my argument as strong as my materials will warrant. To avoid all possibility for any ingenious theorizing that might be indulged in by those whose education had been such that they looked upon the *technicalities* of the common law as about all there was of it, and always squared their arguments acccordingly, the legislature said at the time that it adopted this change that a deed should be a deed and a bond should be a bond, although not under seal. In other words all that the legislature did was to take the seal off.

Code, section 41, paragraph 20:

> 20. The word "deed" is applied to an instrument conveying lands, but does not imply a sealed instrument; and the words "bond" and "indenture" do not necessarily imply a seal, and the word "undertaking" means a promise or security in any form.

I do not suppose that I need stop to argue upon this *motion* whether they should be held to have all the *properties* that they had when required to be *sealed*, or to show that in the

courts of the state a *bond* is held to be a *bond* now just as much as it ever was. Probably that question may be properly *argued* when the case is reached upon its merits. Bonds are now as frequently mentioned in the statutes of Iowa as they ever were, and not unfrequently in the same act, almost the same sentence, with notes and bills of exchange. For instance, section 2082 of the Code of 1873 says:

> Notes in writing, made and signed by any person promising to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange, according to the custom of merchants.

And section 2084 says that *bonds* are *assignable* by endorsement and the assignee may maintain an action in his own name *subject to any defense which the maker may have against the assignee;* and section 2092 provides that grace shall be allowed upon negotiable *bills* or *notes* according to the principles of the law merchant; and by an act of the sixteenth general assembly the rule is extended to sight drafts and orders, but it is nowhere provided, nor has it ever been held in Iowa, that bonds shall be entitled to grace. They are payable according to their terms, or if the date of payment falls on Sunday, upon the next day instead of three days after or the day before, and this, in Iowa, is a statute provision.

The pleader, in drawing the petition, did not seem to think that he was declaring upon eight negotiable promissory notes, for nearly twice eight times he describes them as bonds, and it does not seem to have occurred to counsel who make this motion that such was their character, for they say, "the action was founded upon sundry negotiable *bonds;*" that the defense was that the *bonds* were void and that the plaintiff met this by showing that he was a *bona fide* holder. *Are* they bonds, with all the qualities which pertain to that kind of paper, or are they simply promissory notes negotiable by the law merchant? *That is the question*, and if I have not now succeeded in showing that there is enough of question about it to satisfy your Honors that the writ is neither frivo-

lous nor prosecuted for delay, I should so completely despair of success hereafter as not to leave me the *courage* to argue it.

We ask that the case stand for argument at the proper time upon the single question of jurisdiction.

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